

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

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Before the court are defendants' Motion For Protective Order Regarding Deposition of Third-Party Rich Folk (#198) and Motion To Designate Confidential Material (#222). Also before the court are plaintiffs' Affidavit of Fees and Costs (#210) and Motion To Compel Documents (#225). The court conducted a hearing on these matters on November 17, 2011.

Background

Plaintiffs Genine Cannata, Carolyn Davis, Joan E. Lewis, Sheila A. Rhodes, JoEllen Sutherland, Elizabeth Atkinson, Karen Banks, Patricia Calvin, Connie Post, Carla Rains¹, and Lori Wilk filed their complaint (#1, #1-1, and #1-2) against defendants on November 10, 2009, in the Eighth Judicial District Court, Clark County, Nevada. The action was removed to this court on January 19, 2010. (#1).

Plaintiffs assert claims for (1) hostile work environment/sexual harassment in violation of NRS § 613.330, (2) gender discrimination in violation of NRS § 613.330, (3) retaliation in violation of NRS § 613.340, (4) hostile work environment/sexual harassment in violation of Title VII of the Civil Rights

¹ Elizabeth Atkinson and the defendants signed a stipulation to dismiss all of her claims on March 4, 2010 (#31). Summary judgment was granted in favor of defendants, dismissing Karen Banks and JoEllen Sutherland's claims on July 21, 2011, for failure to disclose this action in their respective bankruptcies. (#187). Carla Rains dismissed all her claims on July 26, 2011 (#190).

1 Act of 1964, 42 U.S.C. § 2000(e), (5) gender discrimination in violation of Title VII, (6) retaliation in
 2 violation of Title VII, (7) discrimination on the basis of age in violation of NRS § 613.330, (8) age
 3 discrimination in violation of the Age Discrimination In Employment Act of 1967, 29 U.S.C. § 621, (9)
 4 constructive discharge, (10) assault against corporate defendants, (11) battery against corporate
 5 defendants, (12) assault against defendant Friedman, (13) battery against defendant Friedman, (14)
 6 invasion of privacy, (15) intentional infliction of emotional distress against corporate defendants, (16)
 7 intentional infliction of emotional distress against defendant Friedman, and (17) negligent retention,
 8 supervision and training of supervisors and managers. (#1, #1-1, #1-2)

9 In the complaint, plaintiffs, who are former female employees of defendant Wyndham
 10 WorldWide Corporation /WorldMark by Wyndham (hereinafter “Wyndham”), allege that during their
 11 employment at Wyndham, they were subjected to “systematic employment discrimination based on their
 12 gender.” *Id.* Plaintiffs contend that they were, among other things, “forced to work in [a] hostile work
 13 environment resulting from severe or pervasive sexual harassment in the workplace.” *Id.* Wyndham’s
 14 management is allegedly largely male-dominated, and due to this, plaintiffs assert, the “management
 15 has permitted a norm of sexual interaction between female employees and their male supervisors,”
 16 which “has become an expectation imposed on female employees – an expectation [p]laintiffs have
 17 refused to meet, to their detriment.” *Id.* Plaintiffs also allege that male managers of Wyndham have
 18 “frequently ogle[d] at and touch[ed] female employees’ buttocks, breasts, and legs.” *Id.* It is plaintiffs’
 19 position that Wyndham “knew or should have known that members of management were “repeat
 20 harassers” who were given unfettered authority and opportunity to subject numerous female employees
 21 to severe or pervasive forms of sexual harassment.” *Id.*

22 Plaintiffs name the corporation itself and its subsidiaries as defendants, as well as “James
 23 Friedman, and DOES, I through X, and ROE BUSINESS ENTITIES, I through X.” *Id.* Although the
 24 complaint names Friedman as the only individual defendant, its allegations specifically name several
 25 other managers or high ranking supervisors that allegedly acted inappropriately. *Id.* The complaint
 26

names Senior Sales Manager Carl Alfano, Director of Marketing Mark Weaver, Manager Derek Devers, Manager Dan Belchar, Manager Vince Lewis, Manager Jeff Rice, Manager Sergio Scozia, HR Director Don Winston, Senior Director Carter Lee, Executive Vice President of Sales and Marketing Rich Folk, In-House Project Manager Jeff Milhollen, Project Director Stephen Connolly, Floor Manager Jim Nelson, Sales Representative Tito Checa, Team Manager Dan Sayadoff, Manager Caesar Martos, Director of HR Karen Case, Regional Vice President Alan Banks, Corporate HR Linda Padia, and Sales Manager James McGlafin. *Id.*

8 Motion For Protective Order (#198)

In the present motion, defendants ask this court to “preclude [p]laintiffs from inquiring about Mr. Folk’s private and consensual relationships at Mr. Folk’s deposition or conducting any other discovery which seeks information regarding his consensual sexual relationships.” (#198). Defendants assert that information of this sort is irrelevant to plaintiffs’ claims, unlikely to lead to admissible evidence, and will only cause Mr. Folk “unnecessary annoyance, embarrassment and oppression.” *Id.* Plaintiffs oppose the request, and assert that this information is relevant to plaintiffs’ hostile work environment claims and rebutting Wyndham’s *Ellerth/Faragher* affirmative defense to liability. (#208). Plaintiffs also contend that the information is relevant to “decipher whether Wyndham aided by [failing to adhere to] its heightened duty to prevent serial harassment by repeat players.” *Id.*

A. Relevant Facts

On July 20, 2011, plaintiffs noticed eight depositions, including the deposition of Executive Vice President of Sales and Marketing for the Wyndham Vacation Ownership, Mr. Rich Folk. (#198-1 Exhibit 1). On July 28, 2011, the defendants sent an email to plaintiffs stating that they objected to the deposition of Mr. Folk in as far as the line of questioning involves Mr. Folk’s consensual relationships. (#198-1 Exhibit 3). Defendants argued that the deposition was “outside the proper scope of discovery,” as Mr. Folk is not accused of sexual harassment by any of the plaintiffs. *Id.* Defendants requested that if plaintiffs thought questioning Mr. Folk was relevant to the action, then plaintiffs were to demonstrate

1 how the consensual relationships were relevant by August 1, 2011. *Id.* On the same day, plaintiffs
 2 explained to defendants that it was their position that since this is a hostile work environment case, it
 3 is relevant how the plaintiffs' subjectively viewed the work environment, including their knowledge of
 4 Mr. Folk and others' relationships with women employees, how HR reacted to Mr. Folk's indiscretions,
 5 and how Mr. Folk supervised and interacted with some of the plaintiffs. (#198-1 Exhibit 4).

6 On August 4, 2011, the parties conducted a telephonic meet and confer. (#198-1 Exhibit 1).
 7 The parties were unable to reach an agreement, and the deposition of Mr. Folk was vacated, contingent
 8 on defendants filing the present motion. *Id.*

9 **B. Argument**

10 The defendants argue that third-party witness Mr. Folk's relationships with employees, and
 11 information relating thereto, should not be a permitted topic for his deposition. (#198). They support
 12 this argument by asserting that such information is irrelevant because only one of the plaintiffs mention
 13 Mr. Folk's relationships, Mr. Folk is not accused of sexual harassment in the complaint, and there is
 14 zero evidence that the relationships were anything but consensual. *Id.* The complaint mentions Mr.
 15 Folk's name twice, and only alleges that Mr. Folk was engaging in sexual activities with female
 16 employees, and that he impregnated at least two female employees. *Id.* Further, in the plaintiffs'
 17 depositions, they did not name Mr. Folk as one who sexually harassed them, and even admitted that his
 18 relationships were consensual. *Id.* Defendants argue that since none of the plaintiffs claim Mr. Folk's
 19 relationships offended them, information relating to the relationships is not relevant to the hostile work
 20 environment claim. *Id.*

21 In opposition to the motion, plaintiffs contend that they are not alleging that Mr. Folk's multiple
 22 sexual relationships by themselves created a hostile work environment, but that they *contributed* to the
 23 hostile work environment. (#208). In the complaint (#1, #1-1, and #1-2), the plaintiffs allege that
 24 Wyndham "has permitted a norm of sexual interaction between female employees and their male
 25 supervisors, which...has become an expectation imposed on female employees..." Plaintiffs also allege

1 that the Wyndham defendants knew or should have known that key members of management were
 2 “repeat harassers,” who were given “unfettered authority and opportunity to subject numerous female
 3 employees to severe or pervasive forms of sexual harassment.” *Id.* Specific to Mr. Folk, plaintiffs
 4 contend that one of Mr. Folk’s relationships resulted in another named executive, Carter Lee, being
 5 issued a written warning for giving a female inferior company funds at the direction of Folk to finance
 6 an abortion. (#208). This action, however, was allegedly never addressed and Mr. Folk was allegedly
 7 never disciplined by the company. *Id.*

8 Plaintiff Ms. Calvin was Mr. Folk’s assistant during the relevant time period. *Id.* Ms. Calvin
 9 alleges that she witnessed women who agreed to be sexually exploited receive perks. *Id.* Mr. Folk
 10 allegedly provided his sexual partners with “special duties, car access, SPIF money, and free living
 11 arrangements.” *Id.* The sexual partners would be given tasks that Ms. Calvin would have normally
 12 done, and would replace Ms. Calvin in meetings, even though Ms. Calvin was Mr. Folk’s executive
 13 assistant. *Id.* Ms. Calvin, as Mr. Folk’s assistant, was ordered to review expense reports approved by
 14 Mr. Folk, that financed his “sexual escapades and inappropriate behavior.” *Id.* Ms. Calvin alleges that
 15 when she tried to file a complaint about this behavior with HR Manager, Karen Case, the word spread,
 16 and Carter Lee and defendant Friedman told Ms. Calvin’s husband that his “wife needs to keep her
 17 mouth shut,” or they both would loose their jobs. *Id.*

18 Therefore, plaintiffs argue that Mr. Folk’s sexual relationships directly relate to “whether
 19 Wyndham took reasonable steps to prevent sexual harassment, whether [Mr.] Folk and Carter Lee
 20 should have been terminated,...and whether [plaintiff] Ms. Calvin was retaliated against in part because
 21 she knew “too much” about [Mr.] Folk’s inappropriate activities.” *Id.*

22 C. Discussion

23 Pursuant to Federal Rule of Civil Procedure 26(b)(1), “[p]arties may obtain discovery regarding
 24 any nonprivileged matter that is relevant to any party’s claim or defense...” During discovery, “[a] party
 25 may, by oral questions, depose any person, including a party, without leave of court...” Fed. R. Civ.

1 P. 30(a)(1). Relevance within the meaning of Rule 26(b)(1) is considerably broader than relevance for
2 trial purposes. See *Oppenheimer Fund v. Sanders*, 437 U.S. 340, 351 (1978) (citation omitted). For
3 discovery purposes, relevance means only that the materials sought are reasonably calculated to lead
4 to the discovery of admissible evidence. *Id.*

5 If the responding party refuses to provide discovery, “the court may order discovery of any
6 matter relevant to the subject matter involved in the action.” Fed. R. Civ. P. 26(b)(1). However, the
7 court must limit discovery if “the discovery sought is unreasonably cumulative or duplicative, or can
8 be obtained from some other source that is more convenient, less burdensome, or less expensive.” Fed.
9 R. Civ. P. 26(b)(2)(C)(I). If the responding party believes that the discovery sought would cause
10 “annoyance, embarrassment, oppression or undue burden or expense,” the party may move for an order
11 from the court “forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery
12 matters.” Fed. R. Civ. P. 26(c)(1)(D).

13 Here, plaintiffs claim that Wyndham’s “management has permitted a norm of sexual interaction
14 between female employees and their male supervisors,” and that Mr. Folk, specifically, had relationships
15 with and impregnated at least two female employees. (#1, #1-1, and #1-2). Plaintiffs also allege that
16 Mr. Folk approved company funds to be used for one of the women’s abortion, and that the company
17 never disciplined him for it. *Id.* The plaintiff’s contend that they were looked over, and that the
18 “paramours” were given special treatment by the male managers, including Mr. Folk, that they were
19 sexually involved in. *Id.*

20 Overall, it is alleged that Wyndham added to the hostile work environment when it failed to
21 adhere to its “heightened duty to prevent serial harassment by repeat players,” and even condoned such
22 actions. *Id.* Therefore, Mr. Folk’s relationships with female employees, whether consensual or not, are
23 relevant to the allegations contained in the complaint, despite the fact that he himself is not a defendant.
24 See *Oppenheimer Fund*, 437 U.S. 340, 351(holding that relevance for discovery purposes is
25 considerable broader.). Plaintiffs may take Mr Folk’s deposition, and may inquire as to his relationships

1 with female employees. To avoid unnecessary annoyance or embarrassment, the transcript of Mr. Folk's
2 deposition will be designated confidential pursuant to the existing confidentiality order and remain
3 sealed unless the court orders otherwise. *See Fed. R. Civ. P. 26(c)(1)(D) and (#125 Protective Order).*

4 **Affidavit of Fees and Costs Pursuant to Court Order (#210)**

5 On August 25, 2011, the court ordered (#205) defendants to pay the reasonable expenses
6 associated with the plaintiffs having to file an emergency motion for an interim sequestration order and
7 to quash third party subpoenas (#184). The court gave plaintiffs ten days from the entry of the order to
8 file a detailed affidavit of fees and costs, and gave defendants ten days thereafter to file a response to
9 the affidavit. (#205). The plaintiffs filed the present affidavit (#210) on September 6, 2011.
10 Defendants filed their response (#217) on September 19, 2011, and plaintiffs filed a reply (#220) on
11 September 20, 2011.

12 Attorney Jill Sullivan declared in the affidavit of fees and costs (#210) that the total fees and
13 costs is \$20,936.25, and that she "reviewed and edited the billing report" and confirmed their truth.
14 Attached to the affidavit, is an itemized chart (#210-1 Exhibit A) detailing what work was performed,
15 who performed the work, how many hours were consumed, the rate of the attorney, and any additional
16 costs. The defendants object to the amount in the affidavit (#217), and assert that the plaintiffs couldn't
17 have spent 64.20 hours on the second motion to quash, when their arguments were simply "cut-and-
18 past[ed]" from the first motion to quash. Defendants contend that the affidavit and the chart fail to show
19 "any support for the reasonableness of the fees claimed or their mind-boggling hourly rates..." (#217).
20 The defendants ask this court to "adjust [p]laintiffs' proposed hourly rates, costs and fees to a reasonable
21 amount commensurate with the amount of effort actually expended by [p]laintiffs." *Id.*

22 Plaintiffs support their affidavit of fees and costs (#220), and ask this court to grant the amount
23 in full. They contend that due to the defendants' sanctionable behavior, they were forced to "exchange
24 several internal and external emails; conduct internal conference calls; review the [c]ourt's order;
25 engage in futile meet and confer efforts; mail correspondence to the third parties altering them to

1 [p]laintiffs' objections to the subpoenas; review documents received pursuant to the subpoenas; request
 2 an emergency sequestration order, draft and file a motion with several exhibits; engage in extensive
 3 review of case law cited by both parties, including additional case law cited by Wyndham in its
 4 opposition brief; and draft and file a Reply in response to several meritless arguments raised by
 5 Wyndham.” (#220).

6 As the court recognized in its original order (#205), the plaintiffs are entitled to reasonable fees
 7 and costs associated with filing the second motion to quash. The court finds that sanctions in the
 8 amount of \$7,500 are appropriate. Defendant Wyndham is ordered to issue a check in the amount of
 9 \$5,000, and Littler Mendelson is ordered to issue a check in the amount of \$2,500. Checks shall be
 10 issued within fourteen days from entry of this order.

11 **Motion To Designate Confidential Material (#222)**

12 On March 3, 2011, the court entered a protective order regarding confidential information.
 13 (#125). In that order, the court specifically stated that a party or non-party may designate as
 14 “confidential” any document or response to discovery which that party or non-party considers in good
 15 faith to contain...information implicating third party privacy rights...” *Id.* Prior to entering this
 16 protective order, the court considered a proposed protective order, along with arguments from both
 17 parties. (#117). In addressing these arguments and deciding upon an appropriate protective order, the
 18 court held that Judge Cook’s neutral protective order was “superior,” because, “as modified, it [is]
 19 tailored to protect third party privacy rights...” *Id.* Pursuant to the court’s protective order (#125), if
 20 a party wishes to dispute the confidentiality of the document, the party may give written notice of the
 21 objection to the party or non-party who designated the material. The designee then has twenty-five (25)
 22 days from the date of receipt to apply to the court for an order designating the material as confidential.
 23 (#125).

24 Defendants designated a document, identified as WRDC.Cannata001019-22 (Exhibit 1
 25 submitted to the court) (hereinafter “the document”), as confidential pursuant to the court’s order

1 (#125). The plaintiffs challenged the confidentiality of the document, and sent an email to defendants
2 stating their position. (#222-1 Exhibit 2). Plaintiffs submitted the document as an exhibit to their
3 opposition to defendants' motion for protective order regarding the deposition of Mr. Folk, and filed
4 it under seal. The document is of relevance to the present litigation, because it contains an employee's
5 interview, where she states her knowledge of Mr. Folk's relationships and the alleged discrepancies
6 surrounding the same. (Exhibit 1).

7 In the present motion (#222), defendants ask this court to uphold the confidential designation
8 of the document in accordance with the parameters set forth in the protective order (#125). Defendants
9 argue that the interview contains information that implicates third party privacy rights which should be
10 "fiercely protected" and were specifically protected by this court's order. (#222). Defendants assert that
11 the protective order was designed to protect these parties' privacy rights, and that the designation would
12 not prejudice the plaintiffs in any manner. *Id.* The plaintiffs would be permitted to use this interview
13 for any legitimate purposes if the court upheld the designation, and the only thing they would be
14 precluded from doing, would be exploiting the non-parties and slandering their names. *Id.*

15 Plaintiffs reassert their position that the interview should not be deemed confidential. (#227). The
16 plaintiffs contend that the defendants have failed to meet their burden of showing "good cause" to
17 designate the interview confidential, and that they have failed to demonstrate that any "harm or
18 prejudice" would result if the document is disclosed. (#227). Further, plaintiffs argue that any privacy
19 interest can be protected by simply redacting the document. *Id.*

20 The situation mentioned in the document was referenced briefly in the complaint (#1-1 page 25),
21 but no female's name was disclosed. The plaintiff's opposition to the motion for protective order
22 mentions the situation, and discloses the initials of one woman alleged to have been impregnated by Mr.
23 Folk. (#208 page 2). The opposition, however, was not filed under seal, rather the filed version
24 contained redacted sections referencing and quoting from the document in question. *Id* at page 5 and
25 6. The quoted sections were redacted as to not bear the name of the individual interviewed and what
26

1 that individual stated. *Id.*

2 As noted above, despite the fact that Mr. Folk is not a named party, his actions, the knowledge
 3 thereof, and any disciplinary steps taken are relevant to the instant action. As also noted, the court
 4 recognizes the confidential and personal nature of the allegations surrounding Mr. Folk and the non-
 5 party women alleged to have been sexually involved with him. Therefore, the court upholds the
 6 confidential designation of the document to protect, during the pretrial proceedings in this action, the
 7 privacy interests of both party and non-party individuals, pursuant to the court's protective order (#125).

8 **Motion To Compel Documents (#225)**

9 Federal Rule of Civil Procedure 34(a) permits each party to serve the opposing party with
 10 document requests within the scope of Rule 26(b) that are "relevant to the subject matter involved in
 11 the action." Fed. R. Civ. P. 26(b). Relevance within the meaning of Rule 26(b)(1) is considerably
 12 broader than relevance for trial purposes. See *Oppenheimer Fund*, 437 U.S. 340, 351 (citation omitted).
 13 For discovery purposes, relevance means only that the materials sought are reasonably calculated to lead
 14 to the discovery of admissible evidence. *Id.* In responding to Rule 34 requests, "the response must
 15 either state that inspection and related activities will be permitted as requested or state an objection to
 16 the request, including the reasons." Fed. R. Civ. P. 34(b)(2)(B). Pursuant to Rule 37(a)(3)(B)(iv), "[a]
 17 party seeking discovery may move for an order compelling an answer, designation, production, or
 18 inspection" if "a party fails to respond that inspection will be permitted – or fails to permit inspection
 19 – as requested under Rule 34." Fed. R. Civ. P. 37(a)(3)(B)(iv).

20 On May 5, 2010, the plaintiffs served defendants with document requests. (#225). In response,
 21 plaintiffs contend, defendants provided inadequate, boilerplate, deficient responses. *Id.* Plaintiffs assert
 22 that they attempted to resolve "*numerous* discovery disputes with Wyndham, to no avail." *Id.* The fact-
 23 discovery deadline as of the date of filing the motion to compel was set for November 14, 2011. *Id.*
 24 Therefore, in addition to compelling defendants to provide adequate responses to the discovery requests,
 25 the plaintiffs ask this court to amend the scheduling order to accommodate production of documents

1 and depositions of Wyndham agents. *Id.* There are several requests that plaintiffs contend were not
2 sufficiently responded to, and plaintiffs have organized them according to topic. *Id.* The court will
3 discuss each separately below.

4 **A. Corporate Structure and Organizational Charts**

5 Requests 28, 30-35, and 176 seek documents explaining the relationship, control, reporting
6 structures, and hierarchies between Wyndham entities. (#225). Plaintiffs assert that defendants
7 provided “boilerplate objections” and referred to Wyndham’s Form 10-K, which allegedly does not
8 “adequately explain the control interrelationships by and among the various...entities.” *Id.* Rather,
9 plaintiffs contend, the Form 10-K provides only “basic employment histories of each executive officer
10 and generic references to its corporate structure.” *Id.* Defendants argue in their opposition (#231), that
11 the 10-K statements for 2006 through 2009 clearly respond to the request, because they set forth the
12 relationship between all the entities, explain the functions and relationships, and identify the Board of
13 Directors and executive teams of various entities. Defendants admit that the responses do not
14 specifically set out the chain of command, but assert that the requests did not seek such information.
15 (#231). Defendants argue that many requests are duplicative, vague, and over broad, and that if the
16 plaintiffs would engage in meaningful meet and confers, the present motion would not be necessary.
17 *Id.*

18 As the court has already determined in its order denying the motion for protective order (#197),
19 information concerning Wyndham’s corporate structure “is relevant and discoverable as it relates to the
20 potential liability of each corporate entity.” *Oppenheimer Fund*, 437 U.S. 340, 351. The motion is
21 granted in this respect. *All* documents responsive to plaintiffs’ request must be provided and/or
22 supplemented by the defendants within fourteen days from the entry of this order. As the defendants
23 assert that the parties have not actually met and conferred in good faith, the parties are required to meet
24 and confer in a good faith effort to specify what the specific requests seek, what has been provided thus
25 far that is responsive, and to eliminate any duplicative requests.

1 **B. Anti-Discrimination Training**

2 Plaintiffs' request No. 85 seeks documents relating to *who* attended anti-
 3 discrimination/harassment trainings, *who* conducted the trainings, *where* and *when* the trainings were
 4 held, and the content of the trainings. (#225). Defendants responded with a general Business
 5 Compliance and Ethics presentation and multiple copies of the 2004 and 2008 anti-harassment
 6 presentations. *Id.* Plaintiffs assert that the response is insufficient because it does not encompass
 7 training materials for the *full* time period and does not specify the *who, what, when, and where* regarding
 8 the trainings. *Id.* Plaintiffs contend that this information is relevant because it relates to the employer
 9 liability prong of plaintiffs' hostile work environment claim. *Id.* Additionally, plaintiffs seek sign-in
 10 sheets for all employees for the trainings, as they suspect that certain managers and supervisors didn't
 11 actually attend the trainings. *Id.* Despite defendants assertion that it would investigate the matter, no
 12 supplements have been provided. *Id.*

13 Defendants claim that they have produced over 300 documents relating to the anti-discrimination
 14 and harassment trainings, from 2005 through the present. (#231). The request for the sign-in sheets,
 15 defendants assert, is over broad, irrelevant and unduly burdensome. *Id.* The acknowledgments of the
 16 employees are kept in each individual file, and not located in a central location. *Id.* Defendants argue
 17 that the fact that employees not involved in the litigation attended the trainings has no relevance to the
 18 instant action. *Id.* Since, the parties that are involved already admitted in their depositions that they
 19 received the information and were made aware of their rights and obligations, the request is duplicative
 20 and does not support plaintiffs' assumption that certain managers didn't attend. *Id.*

21 The court finds that the documents relating to anti-discrimination and harassment training and
 22 the dissemination of the same are relevant to whether the company acted in accordance with the laws
 23 and adequately informed their employees. See *Oppenheimer Fund*, 437 U.S. 340, 351. The fact of
 24 whether or not named managers, employees, and supervisors attended these trainings and whether the
 25 sign-in sheets were fabricated, as plaintiffs allege, is relevant to demonstrating if defendant Wyndham

1 "exercised reasonable care to avoid harassment and to eliminate it when it might occur." *Faragher v.*
 2 *City of Boca Raton*, 524 U.S. 775 (1998). Further, as the court previously held, the fact that
 3 "compliance with a discovery request may involve expense or may be time consuming, does not, in
 4 itself, render it unduly burdensome." (#183). Defendants shall provide *all* documents responsive to
 5 plaintiffs' request for the named parties, managers, and supervisors for the relevant time period, 2005 -
 6 2009, within fourteen days from the entry of this order.

7 **C. James Friedman's Termination**

8 Request 90 seeks information relating to James Friedman's termination, including personnel
 9 action forms, memorandums, and any severance or separation agreements. (#225). Defendants, in
 10 response, referred plaintiffs to Friedman's personnel file that was produced by Friedman himself. *Id.*
 11 No supplement has been provided, and plaintiffs received only one document involving a sexual
 12 harassment complaint against him *after* the court ordered the same. *Id.* Plaintiffs assert that the
 13 response does not identify the authors of the documents or who conducted the investigation interviews.
 14 *Id.* Defendants contend that they have supplemented their response to include the investigation
 15 memorandum. (#231). However, as the request did not seek the authors of any of the documents,
 16 defendants assert that they are not required to provide them. *Id.* Defendants further contend that Mr.
 17 Friedman did not receive a severance agreement, so no production thereof is possible. *Id.*

18 As an initial matter, the court finds any documents relating to defendant Friedman's termination
 19 and the events surrounding it to be relevant. See *Oppenheimer Fund*, 437 U.S. 340, 351. He is a named
 20 defendant in this case and is accused of sexually harassing a number of inferior employees. *Id.* The
 21 court agrees with plaintiffs that a personnel file disclosed from Mr. Friedman himself cannot be
 22 complete and/or sufficient. Wyndham itself would have access to emails relating to his termination and
 23 correspondence surrounding the same, that would not be contained in the personnel file Mr. Friedman
 24 possesses. Defendants shall provide all documents responsive to the request, including documents
 25 revealing the parties involved in his termination and the events leading up to the termination, within

1 fourteen days from the entry of this order.

2 **D. James Friedman's Emails Pertaining To Plaintiffs**

3 In request No. 91, plaintiffs seek emails sent or received by defendant Friedman that pertain to
4 plaintiffs. (#225). Defendants claimed that they would produce the emails, but have not done so. *Id.*
5 Plaintiffs ask this court to order the production of the emails in their native form, with all metadata
6 intact. *Id.* Defendants do not refuse to produce the emails, but due to the sheer volume requested,
7 contend that they have been in the process of identifying responsive documents. (#231). Defendants
8 further assert that the parties would be meeting in October and would provide a joint letter to the court
9 relating to the electronic discovery plan, which would help them ascertain the scope of required email
10 production. No such letter has been received.

11 Relevance, as stated previously, is not an issue when it comes to defendant Friedman and the
12 plaintiffs. See *Oppenheimer Fund*, 437 U.S. 340, 351. As plaintiffs contend that defendants have stated
13 several times that they have emails and are going to be producing them, but have failed to, defendants'
14 argument that they need more time concerns the court. Defendants have been given sufficient time to
15 locate these emails. The court recognizes the large number of emails that may be responsive to the
16 request, and orders the defendants to produce such emails, in their native form with all metadata intact,
17 **as they acquire them**, and to notify plaintiffs when they believe that they have produced *all* emails.
18 The court expects this production will be substantially complete within fourteen days from the entry of
19 this order.

20 **E. Employment Documents Regarding Various Actors**

21 Plaintiffs assert that several documents are still missing from the response to requests 94-117.
22 (#225). These include discipline documents and anti-sexual harassment training acknowledgment forms
23 for Jeff Rice, Cart Lee, Dan Belchar, and Carl Alfano. *Id.* Further, performance evaluations, job
24 descriptions, and discussion forms have not been produced for several other named individuals. *Id.*
25 Defendants contend that they have provided documents they have available, but that for some

1 employees, job descriptions are unavailable. (#231). Further, defendants assert that during meet and
2 confers, they have asked how certain employees employment application, for example, is relevant to
3 the action, but have received no response.

4 It appears to the court that the parties, once again, have failed to engage in meaningful meet and
5 confers regarding these requests. The parties are ordered to meet and confer and to, in good faith,
6 articulate what documents requested actually exist, and how certain documents are relevant and
7 discoverable. If the parties are unable to resolve the issue, defendants shall provide a list of responsive
8 documents that they are refusing to produce, and file a motion for protective order within thirty days
9 from the date of the meet and confer. With regards to the job descriptions that allegedly do not exist,
10 the defendants and their attorneys are to provide the court and opposing counsel with a certification to
11 that effect within fourteen days from the entry of this order.

12 **F. Employment Documents and Sales Data**

13 In requests No 126, 127, 164 and 195, the plaintiffs seek employment related documents for
14 plaintiffs as well as their co-workers who performed the same jobs as they did. (#225). This includes,
15 sales records, resumes, awards, promotions, disciplinary notices, and contracts. *Id.* These documents
16 are relevant because they allow the plaintiffs to assess if other employees were being treated differently
17 and/or were given positions that they were not suitable for due to their sexual interactions with
18 superiors. *Id.* In response to these requests, defendants provided sales data that is not searchable, and
19 failed to include sales rankings demonstrating how the plaintiffs and their peers comparatively
20 performed. *Id.*

21 Defendants argue that the plaintiffs' requests include seventy-seven employees, many of whom
22 are not mentioned in the complaint, are not alleged wrong-doers, and have no relevance to the instant
23 action. (#231). Further, defendants contend that plaintiffs have failed to provide last names for several
24 individuals, and failed to demonstrate whether these employees worked with plaintiffs or the supervisors
25 named, or if they even worked during the same time period. *Id.* The defendants argue that the plaintiffs

1 are not entitled to personnel files for everyone ever employed by Wyndham. *Id.* The court agrees. The
 2 parties have obviously not met and conferred in good faith regarding these requests. The parties are
 3 ordered to do so, in an attempt to narrow the list of names and/or define who the parties are and how
 4 they relate to the present action. If, after this, plaintiffs have not received information they seek
 5 regarding certain individuals, they may file a motion to compel within thirty days from the date of the
 6 meet and confer.

7 **G. Plaintiffs', Plaintiffs' Comparators, and Peer Compensation, Sales Data and Sales**
 8 **Rotation or "Rotor"**

9 The plaintiffs' requests Nos. 128-152, 154, 179, and 195-198 seek information relating to the
 10 plaintiffs', their comparators' and coworkers' total compensation, sales results, and sales
 11 rotation/schedules. (#225). Plaintiffs contend that defendants have only produced the work history of
 12 the comparators, which do not contain the sales data, sales ranking, and compensation related records.
 13 *Id.* Defendants do not oppose providing the requested documents. (#231). Defendants only assert that
 14 documents relating to some of the *thirty* individuals listed have already been produced, some, once
 15 again, are identified by their first names only, and defendants are unable to ascertain *who* plaintiffs
 16 believe to be "comparators." *Id.* Once plaintiffs cure these deficiencies, defendants do not object to
 17 producing documents relating to those comparator employees. *Id.*

18 The parties have not adequately met and conferred on these issues. Defendants are uncertain
 19 as to who the requests pertain, and are unable to provide documents, because they only have first names
 20 of several individuals. These issues could be resolved in a meaningful good faith meet and confer. The
 21 parties are ordered to engage in such a meet and confer regarding these requests. If, after the meet and
 22 confer, plaintiffs have not received adequate responses, the plaintiffs may file a motion to compel within
 23 thirty days from the date of the meet and confer.

24 **H. Emails That Refer To Plaintiffs**

25 Plaintiffs' requests Nos. 156 and 158 seek emails that refer to the plaintiffs and were either

1 received or sent by individuals on a list. (#225). This list was narrowed on June 13, 2011, to include
2 only individuals that participated in the discrimination, benefitted from it, or were the subject of
3 discrimination. *Id.* Defendants contend that the parties were going to meet and confer regarding these
4 issues on October 28, 2011. (#231). Plaintiffs did not mention the meet and confer in their reply
5 (#233). If an agreement was not reached, the plaintiffs may file a motion to compel within fourteen days
6 from the entry of this order.

7 **I. Other Acts of Discrimination**

8 In plaintiffs' request No. 162, they seek all memorializations given in relation to any conduct
9 or behavior directed towards plaintiffs and/or employees Roberts, Triplow, McShane, Scali, Sparks,
10 Kudilkova, Facello, Struck, and Boice. (#225). Defendants stated that they were unable to produce any
11 documents relating to the non-plaintiffs, because they have no information evidencing any claim of
12 sexual or other harassment by those individuals. (#231). Once again, plaintiffs do not mention this in
13 their reply (#233), except for referencing, in a footnote, Mrs. Triplow's alleged harassment complaint.
14 The defendants and their attorneys shall file a certification within fourteen days from the entry of this
15 order confirming that the requested documents are unable to be produced because such documents do
16 not exist.

17 **J. Misuse Of Company Funds**

18 Plaintiffs seek information relating to the use of Wyndham credit cards, funds, or business
19 accounts, including but not limited to "SPIF" accounts, of certain individuals. (#225). Defendants
20 provided nothing in response to this request. (#225). Defendants argue that the request is over broad,
21 as it seeks information relating to fifty individuals, some of whom are not alleged to have engaged in
22 any sexual harassment or discrimination. (#231). The court recognizes that there are allegations that
23 male supervisors and managers were able to use company funds to finance certain expenses not related
24 to work, but related to sexual relationships. The court will narrow this request to information pertaining
25 to individual male managers and supervisors who are named in the complaint, either as a defendant or

1 in the body of the complaint. Defendants shall provide the same within fourteen days from the entry
2 of this order.

3 Accordingly, and for good cause shown,

4 IT IS ORDERED that defendants' Motion For Protective Order Regarding Deposition of Third-
5 Party Rich Folk (#198) is GRANTED in part and DENIED in part, as discussed above. Mr. Folk's
6 deposition shall be conducted and the transcript shall be designated confidential pursuant to the existing
7 confidentiality order and remain sealed unless the court orders otherwise.

8 IT IS FURTHER ORDERED that defendants' Motion To Designate Confidential Material
9 (#222) is GRANTED. The document, and any motion and/or document containing it shall remain
10 confidential, in accordance with the court protective order.

11 IT IS FURTHER ORDERED that plaintiffs' Affidavit of Fees and Costs (#210) is GRANTED
12 in part and DENIED in part, as discussed above. Sanctions in the amount of \$7,500 are awarded.
13 Defendant Wyndham WorldWide Corporation shall issue a check in the amount of \$5,000, and Littler
14 Mendelson shall issue a check in the amount of \$2,500. Checks shall be delivered within fourteen days
15 from the entry of this order.

16 IT IS FURTHER ORDERED that plaintiffs' Motion To Compel (#225) is GRANTED in part
17 and DENIED in part, as discussed above. The parties shall meet and confer as ordered above, within
18 fourteen days from the entry of this order. Defendants shall produce the documents requested as ordered
19 by the court, within fourteen days from the entry of this order. If either party deems it necessary to file
20 a motion to compel or a motion for protective order, they shall do so within thirty days from the entry
21 of this order.

22 DATED this 17th day of November, 2011.



23 _____
24 CAM FERENBACH
25 UNITED STATES MAGISTRATE JUDGE
26